Nos. 99-1687 and 99-1728

IN THE

Supreme Court of the United States

GLORIA BARTNICKI AND ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS;
KEYMARKET OF NEPA, INC., d/b/a WILK RADIO;
LACKAZERNE, INC., d/b/a WGBI RADIO;
JACK YOCUM, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, as applied to the unique facts of this case, the court of appeals' application of the intermediate scrutiny standard of review under the First and Fourteenth Amendments to 18 U.S.C. § 2511(1)(c) & (d) and analogous provisions of Pennsylvania law is consistent with this Court's articulation of that standard.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, Respondents Frederick W. Vopper, a/k/a Fred Williams, Keymarket of NEPA, Inc., d/b/a WILK Radio, and Lackazerne, Inc., d/b/a WGBI Radio (together, "Respondents" or the "radio station")[1] re-

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[1] Pursuant to Supreme Court Rule 29.6, Respondents Keymarket of NEPA, Inc., d/b/a WILK Radio and Lackazerne, Inc., d/b/a WGBI Radio state that neither of them has a parent corporation, nor does any publicly held company own ten percent or more of their respective stock.

spectfully supplement Petitioners' Statements of the Case as follows:

This case arises from the interception, recording and dissemination of the contents of a telephone conversation between Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., plaintiffs below. At all relevant times, Kane was employed as a teacher at Wyoming Valley West High School in Luzerne County, Pennsylvania, and also served as president of the local bargaining unit of the Pennsylvania State Education Association ("PEA"), while Bartnicki was an employee of PEA engaged in contract negotiations with the Wyoming Valley West School District on behalf of the district's teachers. App. at 2a, 60a.[2] During their telephone conversation about the gap between the percentage salary increase offered by the school district and that demanded by the union, Kane made the following statement directed to the school district's leadership:

> Kane: If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news.

Id. 3a. A few moments later, Bartnicki and Kane had the following exchange:

> Bartnicki: Well, but now, uh, all rules are off and they'll discuss anything they want.
>
> Kane: Yeh, well if the rules are off, the rules are off for us, too.

[2] Citations to the decisions below are to the Appendix ("App. at") to the Petition for a Writ of Certiorari filed by the United States in No. 99-1728. Citations to the Petitions in No. 99-1687 and No. 99-1728 are denominated as "Plaintiffs' Pet. at" and "U.S. Pet. at," respectively.

> Bartnicki: Exactly.
>
> Kane: The rules are off for us, too. So, if you want to get beat over the head, too, get beat over the head.
>
> Bartnicki: Yes.

Appendix in *Bartnicki v. Vopper*, No. 98-7156 (3d Cir. filed Aug. 3, 1998) ("3d Cir. App.") at 487a.

The identity of the person who intercepted and recorded this conversation is not known. App. at 3a. It is, however, undisputed that an unknown person deposited a tape recording of the conversation, without any markings to identify its origin, in Respondent Jack Yocum's mailbox. *Id.* 3a, 61a. Yocum, the president of an association of concerned taxpayers organized to oppose the union's demands, in turn gave the recording to the radio station, which broadcast it on a public affairs program to listeners in the Northeastern Pennsylvania community affected by a threatened teachers' strike. *Id.* 3a-4a, 60a; *see* 3d Cir. App. at 486a.

In that regard, it is undisputed that negotiations between the union and the school district, and the prospect of a strike by local teachers, had been a "regular subject of the local media." App. at 60a. As the Third Circuit observed:

> The public interest [in] and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance.

Id. 36a-37a.

REASONS FOR DENYING THE WRIT

Petitioners premise their request for review in this Court on three contentions regarding the decision below: that it (1) presents an "important question of constitutional law reserved by this Court in previous decisions;" (2) "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states;" and (3) conflicts with the District of Columbia Circuit's decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709). Plaintiffs' Pet. at 12; *see also* U.S. Pet. at 9, 15-17. None of these contentions is correct. In fact, the decision below constitutes an unremarkable assessment of whether the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 (together, the "Wiretapping Acts") survives *intermediate* scrutiny under the First and Fourteenth Amendments. In making this fact-bound assessment, the Third Circuit expressly declined to address the "important question of constitutional law" referenced by Petitioners, "struck down" no provision of either statute, and applied the same standard of First Amendment scrutiny embraced by the majority of the District of Columbia Circuit in *Boehner*.

I. THE "IMPORTANT QUESTION OF CONSTITUTIONAL LAW" URGED ON THIS COURT BY PETITIONERS WAS NOT DECIDED BY THE THIRD CIRCUIT

Petitioners characterize this case as raising an important issue of constitutional law in need of resolution by this Court — specifically, a question they assert this Court reserved in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989). *See* Plaintiffs' Pet. at 17; U.S. Pet. at 17-18. The decision below, however, is neither predicated upon, nor did the Third Circuit purport to resolve, any such issue.

In *Florida Star*, a newspaper published the name of a rape victim that it had obtained from a report released to the public by the police. 491 U.S. at 526. This Court, adhering to its decision in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541. In footnote 8 of his opinion for the Court, Justice Marshall observed:

> The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. . . . We have no occasion to address it here.

Id. at 535 n.8.

Bartnicki and Kane argue that this "important question is presented in this case, and [that] this case provides an ideal vehicle to resolve it." Plaintiffs' Pet. at 15-16; *see also id.* at 17 ("[t]his case presents the question thus reserved in *Florida Star*"). The Solicitor General similarly asserts that:

> The court of appeals' decision addresses an important and unresolved issue of constitutional law. This Court has never squarely decided "whether, in cases where information has been acquired *unlawfully* by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."

U.S. Pet. at 17 (quoting *Florida Star*, 491 U.S. at 535 n.8) (emphasis supplied by government). To the contrary, in the decision below, the Third Circuit not only refused to assess "the constitutionality of the Wiretapping Acts by first determining whether the information disclosed was 'lawfully' or

'unlawfully' obtained," it expressly rejected the suggestion that it determine whether application of those statutes to the disclosure of the Bartnicki-Kane conversation survived strict scrutiny pursuant to the "*Daily Mail* principle." App. at 12a-13a. Indeed, the court of appeals "decline[d] to read *Smith* as controlling here" because, it concluded, this Court had "explicitly repudiated any suggestion that *Smith* answers the question whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." *Id.* at 13a (citing *Florida Star*, 491 U.S. at 535 n.8).

Instead, the court of appeals "narrowly circumscrib[ed]" its ruling, App. at 13a, declining either to adopt a "blanket rule" or to resolve "anticipatorily" questions not before it, including the question reserved in *Florida Star*. Rather, the Third Circuit asserted that "'the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'" *Id.* at 14a (quoting *Florida Star*, 491 U.S. at 532-33). In its decision below, therefore, the court of appeals undertook to "resolve the present controversy not by mechanically applying a test gleaned" from cases like *Smith* and *Florida Star*, "but by reviewing First Amendment principles in light of the unique facts and circumstances of this case." App. at 14a.

The record before it led the Third Circuit to subject the civil cause of action asserted here to intermediate scrutiny under the First Amendment, not to a standard of strict scrutiny derived from *Smith*. *Id.* 14a, 28a. That determination was based, not on resolution of the issue "reserved" in *Florida Star*, but rather on the court's conclusion that the Wiretapping Acts' asserted purpose in prohibiting the use and disclosure of unlawfully intercepted communications — *i.e.*, denying the "wrongdoer" who unlawfully intercepts a protected

communication "'the fruits of his labor . . . by eliminating the demand for those fruits by third parties,'" *id.* 28a (quoting United States' brief) — "does not rely on the communicative impact of speech," *id.* Accordingly, the court of appeals held, the Acts are "properly treated as content-neutral" regulations subject to intermediate First Amendment scrutiny. *Id.*[3] Thus, the Third Circuit had no occasion to determine, and did not purport to decide, whether application of strict scrutiny was otherwise rendered inappropriate because the information at issue was allegedly "acquired unlawfully." *Florida Star*, 491 U.S. at 535 n.8.[4] In short, the decision below did not adjudi-

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[3]The court of appeals' conclusion in this regard would, however, appear to be in error. Even content-neutral statutes are subject to strict scrutiny where, as here, they "'unduly constrict the opportunities for free expression.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (citation omitted). In *Butterworth v. Smith*, 494 U.S. 624, 632 (1990), for example, the Court subjected to strict scrutiny and invalidated a content-neutral statute that prohibited grand jurors from disclosing their testimony, whatever its content. *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1393 (2000) (plurality opinion) (intermediate scrutiny appropriate because statute was *not* "complete ban on expression"). As construed by Petitioners, the Wiretapping Acts preclude *all* disclosures of the contents of *all* unlawfully intercepted communications.

[4] Even had the court of appeals been inclined to resolve the issue posed in *Florida Star*, it could not properly have done so in a manner that permitted application of the Wiretapping Acts to Respondents. Although the district court assumed, for purposes of summary judgment, that the Bartnicki-Kane conversation had been unlawfully intercepted in the first instance, there is no evidence that the unknown person who placed the recording in Yocum's mailbox had unlawfully intercepted it rather than himself receiving it from a third party. As Respondents argued below, however, even assuming that Yocum received the recording from a third party who had intercepted it unlawfully, this Court's First Amendment jurisprudence would nevertheless require application of the "*Daily Mail* principle" here. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring) ("Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the

cate the issue urged on this Court by Petitioners in this case. *See, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) ("No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'") (citation omitted).

II. THE DECISION BELOW CONSTITUTES AN UNREMARKABLE APPLICATION OF INTERMEDIATE FIRST AMENDMENT SCRUTINY TO THE UNIQUE FACTS OF THIS CASE

As the foregoing discussion demonstrates, Petitioners are incorrect when they suggest that the decision below "strikes down provisions of both a federal and a state statute" and "calls into question the constitutionality of provisions enacted by a majority of the states." Plaintiffs' Pet. at 12. Rather, the Third Circuit held only that, under "the unique facts and circumstances of this case," App. at 14a, the imposition of civil liability on these Respondents pursuant to 18 U.S.C. § 2511(1)(c) & (d) and 18 Pa. Cons. Stat. Ann. § 5725 does not survive intermediate scrutiny under the First and Fourteenth Amendments. The court of appeals' formulation of this Court's standard of intermediate scrutiny is both unremarkable and consistent with the constitutional application of the Wiretapping Acts in the run of cases in fact contemplated by the legislature.

Petitioners do not complain that the level of scrutiny adopted by the court of appeals at their urging was incorrect. Moreover, Petitioners do not contend that the Third Circuit misapprehended the scope of review contemplated by the intermediate scrutiny doctrine. As the court of appeals correctly noted, intermediate scrutiny "encompasses some balancing of the state interest and the means used to effectuate

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hands of the press, unless the need for secrecy is manifestly overwhelming.").

that interest." App. at 29a. The decision below reflects the Third Circuit's recognition that intermediate scrutiny contemplates an examination of, *inter alia*, "whether the regulation is 'narrowly tailored to serve a significant governmental interest,'" *id.* 30a (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), and whether the burden that the regulation places on speech is "'substantially broader than necessary'" to vindicate that interest, App. at 41a-42a (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)). *See also, e.g., City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1397 (2000) (describing relevant element of intermediate scrutiny as requirement "that the restriction [be] no greater than is essential to the furtherance of the government interest"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) (describing relevant element of intermediate scrutiny as requirement that regulation not "'"burden substantially more speech than is necessary to further"'" government interest) (citations omitted). Thus, the court of appeals limited its inquiry to whether "the government has shown that its proffered interest is sufficiently furthered by application *to these defendants* of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake." App. at 32a (emphasis added).[5]

At bottom, therefore, Petitioners' request for review in this Court rests on their disagreement with the manner in which

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[5] In dissent in the court of appeals, Judge Pollak emphasized his agreement with the majority's formulation of the constitutional principles governing its decision; he parted company with the majority only in the manner in which it applied that principle to the facts of the case. *See* App. at 45a (Pollak, J., dissenting) ("I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's *ultimate application* of its analysis to the case at bar.") (emphasis added); *see also id.* 46a-47a (same).

the Third Circuit applied this Court's intermediate scrutiny standard to the facts of this case. The limited scope of the decision below is further reflected in the court of appeals' statement of the issue it actually decided:

> [W]hether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

Id. 2a.

In this fact-specific context — involving the "disclosure" of information of significant public concern to citizens of a local community by persons who played no role of any kind in an interception in violation of the Wiretapping Acts — the Third Circuit rejected the government's contention that, as applied in this case, "the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." *Id.* 33a. The court correctly recognized that the government had "offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation." *Id.* Under these circumstances, the Third Circuit concluded, application of the Wiretapping Acts to Respondents burdened more speech than necessary since "the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.* 35a. In so holding, the court of appeals expressly disclaimed any intent that its ruling apply beyond the specific circumstances presented — *i.e.*, circumstances in which the Wiretapping Acts are applied to punish those who disclose information about matters of public con-

cern and "who neither encouraged nor participated directly or indirectly in the interception, an application *rarely* attempted." *Id.* 39a (emphasis added). As construed by the court of appeals, therefore, the statutes — including the private damages remedies at issue here — remain in full force and effect in all other circumstances.

The court of appeals' application of intermediate scrutiny in this narrow context accords with this Court's First Amendment jurisprudence. Simply put, the government has failed to provide any support, from the federal Wiretapping Act's legislative history or otherwise, for its contention that the statutory prohibition on disclosure of an intercepted communication, as applied to disclosure of a newsworthy matter of significant public concern by an innocent recipient of the communication, is narrowly tailored to effectuate the Act's preclusion of illegal interception in the first instance. *Id.* 33a.[6] As this Court has marked the contours of intermedi-

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[6] The Solicitor General attempts to find support for the proposition that effective deterrence of illegal interception of telephone conversations requires application of a prohibition on disclosure to those, like Respondents here, who did no more than disclose to the public the newsworthy contents of such a conversation, in the Senate Report's passing observation that "'[o]nly by striking at all aspects of the problem can privacy be adequately protected.'" U.S. Pet. at 15 (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. (1968) ("1968 Senate Rep.") at 69). The quoted passage, however, reflects a focus by Congress not on one who disseminates information, but rather on an entirely different player in the interception process:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. An attack must also be made on the possession, distribution, manufacture and advertising *of intercepting devices*. All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected.

1968 Senate Rep. at 69 (emphasis added). The legislative history contains no indication that Congress was concerned with the type of newsworthy disclosure at issue here; to the contrary, to the extent it addressed the use

ate scrutiny, the Third Circuit could not properly have reached a different conclusion on the facts of this case:[7] "'[w]hen the government defends a regulation on speech . . . .[i]t must demonstrate that . . . *the regulation will in fact alleviate these harms in a direct and material way.*'" App. at 34a n.5 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995)) (emphasis supplied by court of appeals); *accord 44 Liquormart, Inc. v.*

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and disclosure provisions at all, its attention was focused on the protection of confidential information such as trade secrets and other proprietary business information that do not constitute matters of public concern, as well as truly private affairs such as marital and similar deeply personal communications. *See id.* at 67.

[7] The Solicitor General asserts that the legislative purpose in prohibiting the use and disclosure of intercepted communications can be analogized to the deterrent effect of statutes that sanction the possession of child pornography or that prohibit the receipt of stolen property. *See* U.S. Pet. at 13. Such analogies are, however, faulty. Reliance by Petitioners on *Osborne v. Ohio*, 495 U.S. 103 (1990), and *New York v. Ferber*, 458 U.S. 747 (1982), *see* U.S. Pet. at 13 & n.7, is misplaced because the statutes at issue in those cases regulated child pornography, a category of speech that, unlike that of Respondents here, is not entitled to protection under the First Amendment. The government's analogy to statutes criminalizing the receipt of stolen goods overlooks both the constitutional distinction between wholly unprotected conduct and the protected speech of Respondents here, as well as the fact that, because money drives the market for stolen goods, eliminating the buyer will of necessity have a *direct* impact on the seller in that context. In this case, whatever may have been the motive of the interceptor of the Bartnicki-Kane conversation, it was not to sell the tape recording. Moreover, the judgment below does not disturb the applicability of the Wiretapping Acts to circumstances—such as industrial espionage or insider trading—in which money provides a financial incentive for disclosure. Nor does it prevent application of the Acts to the disclosure of purely private communications unrelated to matters of public concern such as those, referenced by Congress, between spouses about their marriage, or between patients and their doctors. *See* 1968 Senate Rep. at 67; S. REP. NO. 541, 99th Cong., 2d Sess. (1986) at 3.

Rhode Island, 517 U.S. 484, 505 (1996) (while "common sense supports the conclusion" that prohibition against price advertising of alcohol would lead to increase in prices and lower demand, "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *City of Erie v. Pap's A.M.*, 120 S. Ct. at 1404 (Souter, J., concurring in part, dissenting in part) (concluding that the "upshot" of Court's precedents "is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (burden of justifying restriction on commercial speech "is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981) (zoning ordinance banning live entertainment failed heightened scrutiny where petitioners presented no evidence, and court did not "find it self-evident," that live entertainment would cause problems with parking, trash, police protection, and medical facilities).

Finally, the Solicitor General's contention that the Wiretapping Acts, as applied here, burden no more speech than "[]necessary" or "'essential'" to achieve the asserted content-neutral statutory purpose, U.S. Pet. at 12, 13 (citation omitted), is doubly flawed.[8] First, the legislative history not only

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[8] To the extent that the government maintains that an additional justification for enforcing the Wiretapping Acts against Respondents is that prohibiting disclosure prevents further injury flowing from the initial unlawful interception, it has no proper application under the circumstances of this case. The public disclosure of a conversation between two

fails to articulate any basis for the government's contention in this regard, it cannot reasonably be squared with Congress' decision to limit to a fine the criminal penalties to be imposed on those who, in circumstances such as are presented by this case, in fact intercept protected communications. *See* 18 U.S.C. § 2511(4)(b)(ii); *see also Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street."). Enhancement of those criminal penalties to include at least the prospect of incarceration would, it can reasonably be presumed, have a more direct effect on illegal interceptions than the indirect prohibition on disclosure at issue here. *See, e.g., Boehner v. McDermott*, Civ. No. 98-594 (TFH), 1998 WL 436897, at *4 (D.D.C. July 28, 1998) (deterrent value of $500 fine imposed on interceptors in that case was "almost laughable"), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed* (U.S. Apr. 25, 2000) (No. 99-1709).

Second, by imposing liability on those who have "reason to know" that a disclosed communication involving a matter of public concern was unlawfully intercepted, the statutes are

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union officials in which they seriously contemplate acts of violence against public officials, *see* App. at 36a-37a, in no sense gives rise to the kind of injury Congress sought to redress. Indeed, Bartnicki and Kane have expressly stipulated that they do not seek to recover damages for actual injury caused by the public disclosure of their conversation. *See* 3d Cir. App. at 358a (statement of material facts not in dispute); *see also id.* 329a (Bartnicki's cellular telephone contract reflects her recognition that such calls could be intercepted and overheard). Finally, as the Third Circuit correctly noted, any argument that Bartnicki and Kane are entitled to damages attributed to the "publicity" given by Respondents to their scheme—which concededly constitutes a matter of significant public concern—would rightly be subject to strict scrutiny. *See* App. at 27a. *Cf. Jenkins v. Bolla*, 600 A.2d 1293, 1296 (Pa. Super. Ct. 1992) (no cause of action for publication of private facts where information disclosed relates to matter of public concern).

demonstrably overbroad, reaching — as the Petitioners contend they do here — persons whose only "reason to know" of an unlawful interception derives from the unadorned fact that a recording exists. *See* App. at 10a ("'a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception'") (quoting district court); *id.* 56a (Pollak, J., dissenting) ("reason to know" standard poses "substantial First Amendment difficulty"). Under the "reason to know" standard, any person who heard the recording at issue on the radio and then disclosed a portion of its contents across the dinner table would have as much "reason to know" it had been intercepted unlawfully as did Respondents here. "Not only is this not narrow tailoring, this is not tailoring of any sort." *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting); *see also id.* ("I do not see how we can draw a line today that would punish [the defendant source] and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information . . . and published it again.").

In the last analysis, the "principal difference[]" between Petitioners and the court of appeals "lies in the weight [they assign] the factors to be balanced" in the application of intermediate scrutiny to the facts of this case. App. at 37a. "A petition for a writ of certiorari," however, "is rarely granted when the asserted error consists," as it does here, of an alleged "misapplication of a properly stated rule of law." S. Ct. Rule 10.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *BOEHNER v. McDERMOTT*

Finally, Petitioners contend that the decision below conflicts with that of the District of Columbia Circuit in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), a case the So-

licitor General describes as "virtually identical" to this one. U.S. Pet. at 15-16; *see also* Plaintiffs' Pet. at 13 ("[t]he conflict between the Third Circuit's decision in this case and the D.C. Circuit's decision in *Boehner* is clear and inescapable"). An examination of the decisions, however, reveals (i) that the two courts each applied the same constitutional principle in an appropriately fact-specific, narrow manner, and (ii) that the result in each is properly attributed to the unique facts at issue.

In *Boehner*, the D.C. Circuit, like the Third Circuit here, determined that application of 18 U.S.C. § 2511(1)(c) & (d) should be subjected to intermediate scrutiny. *See Boehner*, 191 F.3d at 467 (Randolph, J.); *id.* at 479 (Ginsburg, J.). In separate opinions, Judges Randolph and Ginsburg applied that standard to the facts before them, expressly limiting the scope of their ruling to that specific context. *See id.* at 478 (Randolph, J.) (statutes "are not unconstitutional *as applied in this case*") (emphasis added); *id.* at 478-79 (Ginsburg, J.) (emphasizing limited reach of holding and concluding that federal Wiretapping Act "is not unconstitutional *as applied in this case*") (emphasis added); *see also* App. at 45 n.2 (Pollak, J., dissenting) (court in *Boehner* "was at pains to point out the limited scope of its ruling"). Indeed, as Judge Randolph emphasized:

> McDermott's challenge is only to the statute as it applies to his delivery of the tape to the newspapers. Whether a different analysis would govern if, for instance, McDermott . . . read[] a transcript of the tape in a news conference, is therefore a question not presented here. Nor should we be concerned with whether [the Wiretapping Acts] would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call. The focus must be on McDermott's activity and on his activity alone.

191 F.3d at 467 (Randolph, J.); *see also id.* at 477-78 ("Whether the statute would be constitutional as applied to a newspaper who published excerpts from the tape — who, in other words, engaged in speech — thus raises issues not before us.").

Thus, the D.C. Circuit concluded only that, *as applied against McDermott*, the statute withstood intermediate scrutiny. Specifically, in view of what Judges Randolph and Ginsburg described as McDermott's role in the illegal "transaction" that resulted in publication of the conversation by others, the court determined that the government's interest in protecting the privacy of such conversations would be furthered by subjecting McDermott to civil liability. *See id.* at 478. Moreover, the court concluded, the burden on First Amendment interests under such circumstances was "'no greater than is essential to the furtherance of that interest.'" *Id.* at 470 (citation omitted).

The D.C. Circuit's decision in *Boehner* is, therefore, self-evidently a product of the unique facts of that case. Those facts, in turn, are properly distinguished from those at issue here in a manner that determined the outcome of the court's application of the intermediate scrutiny standard in *Boehner*. In that case, it was undisputed that the original interception was unlawful. John and Alice Martin, who are alleged to have deliberately followed Representative Boehner's automobile for that purpose, *see Boehner v. McDermott*, 1998 WL 436897, at *1, "used a radio scanner to eavesdrop on the conversation" between Boehner and his colleagues, which they then recorded, *Boehner*, 191 F.3d at 465. The Martins "publicly confessed" their role and ultimately pleaded guilty to criminal charges brought against them. *Id.*[9] Moreover, they

[9] As Judge Randolph recognized in *Boehner*, the fact that McDermott knew who his source was and that his source had acquired the recording unlawfully distinguishes *Boehner* from *Landmark Communications, Inc. v. Virginia*, 435 U.S. at 838, in which the record "contained no evidence

"personally delivered the tape to Representative McDermott" under cover of a letter explaining that "the tape contained 'a conference call heard over a scanner.'" *Id.* As reflected in the same letter, the Martins apparently had entered into an agreement to the effect that McDermott "would arrange for them to receive immunity from criminal prosecution" in return for delivery of the tape. *Boehner v. McDermott*, 1998 WL 436897, at *1.

Thus, as the facts were presented to the D.C. Circuit in the context of McDermott's motion to dismiss, he had notice at the time he received the tape both that its acquisition had, in fact, been illegal, and that the Martins expected something of value in return for providing the cassette to him. These facts led Judge Randolph to conclude that McDermott had gained access to the recording through actual participation in an illegal transaction:

> [T]hroughout this litigation, McDermott has attempted to portray himself as an innocent. Again and again he insists that he "lawfully obtained" the tape recording from the Martins. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. The Martins violated [the federal Wiretapping Act] not once, but twice — first when they intercepted the

regarding who supplied the newspaper with the information [regarding a pending investigation of a state judge, dissemination of which was prohibited] or how they obtained it." *Boehner*, 191 F.3d at 474-75 (Randolph, J.). The record below, in contrast, like that in *Landmark*, reveals nothing about the origin of the recording at issue here. The facts of *Boehner*, like those at issue in *Peavy v. Harman*, 37 F. Supp. 2d 495 (N.D. Tex. 1999), *appeal pending*, No. 99-10272 (5th Cir. argued Apr. 3, 2000) (plaintiffs' conversation intercepted by defendant neighbor who made recordings available to defendant media), also effectively rebut the government's contention that, in the context of disclosures of newsworthy information involving matters of public concern, the interception itself is—as in the case of industrial espionage that Congress had in mind—"'typically a clandestine crime.'" U.S. Pet. at 3 (quoting 1968 Senate Rep. at 96).

> call and second when they disclosed it to McDermott. By accepting the tape from the Martins, McDermott participated in their illegal conduct. That transaction may have involved a quid pro quo. When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him. . . . It is enough to point out, as Boehner does, that in receiving the tape, McDermott took part in an illegal transaction.

Boehner, 191 F.3d at 475-76 (Randolph, J.). Judge Ginsburg, whose concurrence in the judgment produced the result in *Boehner*, likewise concluded that "McDermott knew the transaction [by which he acquired the tape from the Martins] was illegal at the time he entered into it," and, as a consequence, he could not be said to have lawfully acquired it. *Id.* at 479 (Ginsburg, J.).[10] As Judge Randolph emphasized, "[t]he link between the Martins and McDermott was direct. Whether someone further down the chain would have a defense . . . that the taint of illegality was sufficiently dissipated . . . is something we do not decide." *Id.* at 469 n.7 (citation omitted).

In this case, in contrast, the record "is *devoid* of any allegation that the defendants" — *including Yocum* — "encouraged or participated in the interception in a way that would justify characterizing them as 'wrongdoers.'" App. at 33a (emphasis added). As the Third Circuit explained, "Yocum has not been

[10] Judge Sentelle, in dissent in *Boehner*, was equally explicit on this point: McDermott "willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing." 191 F.3d at 481 (Sentelle, J., dissenting).

shown to have 'entered into' any transaction with the interceptors," *id.* 40a-41a, nor is there any dispute that Yocum simply discovered the cassette in his mailbox, and does not know who put it there, *see id.* 61a. There was no evidence presented in opposition to his motion for summary judgment that Yocum made any agreement with the interceptor or that he solicited a copy of the recording.[11] Thus, the Solicitor General's suggestion that the two "courts of appeals have reached different conclusions regarding the constitutionality of the application of an Act of Congress to *materially indistinguishable facts*," U.S. Pet. at 17 (emphasis added), is incorrect.

As this Court has emphasized in articulating the considerations governing review on *certiorari*, a petition will be granted only for "compelling reasons," including a conflict between two courts of appeals "on the same important matter." S. Ct. Rule 10(a). While the reasoning of the various judges in this case and in *Boehner* concededly differs in certain respects, both courts subjected the challenged statutes to intermediate scrutiny and, based on the unique facts before them, reached discrete conclusions with respect to the constitutionality of applying them in the circumstances presented. Indeed, there is no reason to believe that either court would have reached a conclusion different from that of its sister circuit if presented with the facts of the other case. It bears emphasis in this regard that both courts expressly paid close heed to the admonition of this Court

> "that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amend-

[11] Accordingly, the argument that any "taint of illegality" was sufficiently dissipated by the time the recording reached the news media's source—a question that the court in *Boehner* expressly recognized was not before it, 191 F.3d at 469 n.7—*was* squarely presented in this case.

> ment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."

App. at 14a (quoting *Florida Star v. B.J.F.*, 491 U.S. at 532-33) (citations omitted); *see also Boehner*, 191 F.3d at 471 (Randolph, J.) (same). The fealty of the courts of appeals to this requirement fairly precludes the suggestion that their limited decisions, rendered on materially different records, are in conflict in any constitutionally meaningful sense.[12]

[12] Even were the D.C. and Third Circuits' respective applications of the intermediate scrutiny standard deemed to present a "'true'" conflict, "'the impact of the conflict is narrowly confined and is not apt to have continuing future consequences.'" John Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 112 (1959), *quoted in* ROBERT L. STERN *et al.*, SUPREME COURT PRACTICE (7th ed. 1993) ("SUPREME COURT PRACTICE") at 169; *see also* William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1982) (noting Court's "'policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question'"), *quoted in* SUPREME COURT PRACTICE at 171.

CONCLUSION

For the foregoing reasons, Respondents Frederick W. Vopper, a/k/a Fred Williams; Keymarket of NEPA, Inc., d/b/a WILK Radio; and Lackazerne, Inc., d/b/a WGBI Radio respectfully request that the Petitions for Writs of Certiorari be denied.

Respectfully submitted,

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